

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
JOY REYES, as Infant Plaintiff by her Mother  
and Natural Guardian, ELLEN REYES  
individually,

Plaintiffs,

Docket No. CV-08-0074 (JFB)(ETB)

-against-

FAIRFIELD PROPERTIES, DAVID BERGER,  
DAVID FORD, and DAVID NOBILE,

Defendants.

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**MEMORANDUM OF LAW**

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**PRELIMINARY STATEMENT**

This memorandum of law is respectfully submitted on behalf of Defendants Fairfield Properties (“Fairfield”), David Berger, David Ford and David Nobile (collectively, the “Defendants”) in support of their motion for an order pursuant to the Federal Rules of Civil Procedure (“F.R.C.P.”) Rule 12(b)(6), dismissing the Amended Complaint filed by Plaintiff Ellen Reyes filing on behalf of herself and her daughter Joy Reyes (“Plaintiff”) in its entirety.

In her Amended Complaint, Plaintiff alleges claims for (i) discrimination and retaliation in violation of the Federal Fair Housing Act (“FHA”), (ii) a violation of Plaintiff’s civil rights due to racial discrimination, (iii) discrimination in violation of New York State Human Rights Law (“NYS HRL”), (iv) intentional infliction of emotional distress (“IIED”), (v) breach of contract, (vi) breach of implied duty of good faith and fair dealing, and (vii) unlawful eviction. The linchpin of this action was the denial of Plaintiff’s demands for Fairfield 64 Gibson LLC (the “Owner”) to renovate Plaintiff’s apartment located at 64 Gibson Avenue, Valley Stream, New York (the “Building”) and the Building’s common areas in order to accommodate minor Plaintiff’s disability<sup>1</sup>.

Plaintiff alleges that the Defendants’ refusal to make the renovations violates the FHA (42 U.S.C. §3604[f][3][B]) and the NYS HRL §296(18) in that the failure to comply with Plaintiff’s demand constitutes discrimination against the Plaintiff on the basis of her disability. Plaintiff also alleges that the Defendants violated the retaliation provisions of the FHA (42 U.S.C. §3617) when Owner commenced holdover proceedings against her in state court due to her filing of a complaint with the New York State Division of Human Rights (“NYS DHR”) and obtained a judgment giving Owner possession of her apartment based on a settlement of a

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<sup>1</sup> Fairfield 64 Gibson LLC is the fee owner of the Building. Named defendant Fairfield is a New York general partnership and does not have any ownership interest in the Building.

holdover proceeding brought in state court predicated on a settlement agreement executed by Plaintiff Ellen Reyes in that state court proceeding. In addition to the foregoing, Plaintiff has alleged a claim for racial discrimination pursuant to 42 U.S.C. §1982, as well as various state law claims. Plaintiff alleges that Defendants' refusal to comply with Plaintiff's demands to renovate the Building and her apartment constituted IIED. Plaintiff further alleges that Defendants' commencement of the holdover proceeding and the resulting eviction -- based on the settlement agreement executed by Plaintiff Ellen Reyes -- constituted a breach of contract, a breach of implied duty of good faith and fair dealing, and unlawful eviction pursuant to New York Real Property Actions and Proceedings Law ("NY RPAPL") §853.

As will be shown below, Plaintiff's claims should be dismissed on the following grounds. First, Defendants had no obligation to perform alterations or work to renovate her apartment and the common areas of the Building (collectively, the "Premises") because such renovations are not an obligation created by the reasonable accommodations provisions of the FHA. Plaintiff's claim for relief based upon the alleged retaliatory acts by Defendants should be dismissed due to the fact that (i) Plaintiff signed a stipulation of settlement voluntarily dismissing the holdover proceeding thereby admitting her status as a holdover tenant, and (ii) Plaintiff has failed to show a causal connection between her requests for renovation and her filing of complaints with the LIHS and NYS DHR, and the commencement of the holdover proceeding. Moreover, since Plaintiff Ellen Reyes executed the settlement agreement consenting to Owner's possession of the apartment and the State court held -- on Plaintiff's order to show cause to stay the warrant of eviction issued pursuant to that settlement -- that Owner was entitled to possession of the apartment, this claim is barred by the *Rooker-Feldman* doctrine, *res judicata*, and collateral estoppel. Plaintiff's claim of racial discrimination should be dismissed because the Amended

Complaint lacks the requisite facts to meet the minimum pleading standard established by case law. Plaintiff's claim for relief pursuant to the NYS HRL, Executive Law §296(18), which mirrors the FHA, should be dismissed pursuant to the same reasoning by which the claims based on the FHA should be dismissed. Specifically, Defendants had no obligation to perform work on the Premises in order to accommodate Plaintiff. Plaintiff's claim for relief for IIED should be dismissed as she has not pled any outrageous conduct which could be a sufficient basis for a claim of IIED. Plaintiff's claims for relief based upon the alleged Breach of Contract, Breach of Implied Duty of Good Faith and Fair Dealing, and racial discrimination, should be dismissed because they are barred by *res judicata*, collateral estoppel and the *Rooker-Feldman* doctrine.

Moreover, Plaintiff's claims against the individual defendants David Berger, David Ford and David Nobile should be dismissed on the additional and independent ground that Plaintiff has failed to plead any factual support of any discriminatory actions on the part of any of them. In addition, the Amended Complaint should be dismissed on the independent ground that it names Fairfield Properties instead of the Owner as the defendant.

### **STATEMENT OF FACTS**

For a complete statement of the facts relevant to this motion, the Court is respectfully referred to the affidavit of Mark Broxmeyer, duly sworn to on February 6, 2009 (the "Broxmeyer Affidavit"), incorporated by reference herein.

### **ARGUMENT**

#### **POINT I**

#### **PLAINTIFF HAS FAILED TO STATE A CLAIM FOR WHICH RELIEF MAY BE GRANTED PURSUANT TO THE FHA**

In Count One of the Amended Complaint, Plaintiff alleges that Defendants violated the FHA, 42 U.S.C. §3604(f)(3)(B), by refusing to make alterations and renovations to the Building

and apartment where Plaintiff lived based on her disability. Specifically, Plaintiff alleges that Defendants should have created a wheelchair accessible entrance to the Building, built curb ramps at dwelling entrances, re-paved the parking lot, designated parking with appropriate signs, widened bathroom doors to accommodate wheelchair access and eliminate the step that was at the entrance to Plaintiff's apartment. (Amended Complaint ¶ 18).

**A. The FHA Does Not Include Alterations To Pre-1991 Buildings As An Accommodation**

The FHA and its accompanying interpretive regulations explicitly set forth the kinds of accommodations to which tenants may be entitled based upon disability. While buildings constructed after 1991 must comply with specific construction requirements to accommodate persons with disabilities (see 42 U.S.C. §3604(f)(3)(C)), pre-existing structures such as the Building in the instant matter are subject to different and less onerous requirements.<sup>2</sup>

42 U.S.C. §3604, entitled "Discrimination in the Sale or Rental of Housing and Other Prohibited Practices," states that "it shall be unlawful":

“(f)(3)(B): [to refuse] to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling. . .” 42 U.S.C. §3604(f)(3)(B)

This section clearly defines a reasonable accommodation as an accommodation to “rules, policies, practices, or services.” There is no duty imposed upon landlords or building owners to construct new facilities, features, or elements at a tenant's request in buildings built prior to 1991. Thus, a reasonable accommodation under 42 U.S.C. §3604(f)(3)(B) does not include renovations to a residential building built prior to 1991 for the benefit of persons with disabilities. Plaintiff has failed to plead a denial of any changes to any rule, policy, practice or

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<sup>2</sup> The Building was constructed for first occupancy in 1971. (See Broxmeyer Affidavit, Exhibit “G”).

service, but is instead claiming entitlement to new construction which is not required under the statute.

Here, Plaintiff has alleged that the defendants' refusal to, among other things, build her a ramp and widen doorways in her apartment to accommodate the minor Plaintiff's disability constitutes discrimination pursuant to the FHA. Similarly, in Rodriguez v. 551 West 157<sup>th</sup> St. Owners Corp., 992 F.Supp. 385 (S.D.N.Y. 1998), the plaintiff was confined to a wheelchair due to cerebral palsy, and was thus unable to enter and exit the building where he lived without assistance. The plaintiff demanded that a lift or ramp be installed in order to make the building wheelchair accessible, alleging that the failure of the building owners to provide such a ramp was a violation of 42 U.S.C. §3604. The Court held that "to undertake to construct an entirely new facility in an existing building does not, under these circumstances, qualify as an 'accommodation' of a 'rule, policy, practice or service,' when the term 'construction' is nowhere to be found and the term 'facility' is excluded." Rodriguez, 992 F.Supp. at 387 (*citing Shapiro v. Cadman Towers Inc.*, 51 F.3d 328 (2d Cir. 1995)); *see also*, Thompson v. Westboro Condominium Association, 2006 WL 2473464 (W.D. Wash.). The Court in Rodriguez dismissed the plaintiff's FHA claims and declined to exercise jurisdiction over the remaining state law claims.

In contrast to Rodriguez, in Shapiro v. Cadman Towers, Inc., *supra*, the disabled plaintiff sought a preliminary injunction requiring the defendants to alter their first-come/first-serve policy in allocating parking spaces and move her to the front of the waiting list to obtain a parking space in her building's parking garage as an accommodation to her disability. Shapiro, 51 F.3d 328 (2d Cir. 1995). The court held that Section 3604(f)(3)(B) of the FHA required that defendants "reasonably accommodate Shapiro's need for a parking space in the Cadman Towers'

parking garage . . . [and] this accommodation may involve some changes to the Cadman Towers' present method of allocating parking spaces and may require the cooperative to incur some costs." Shapiro, 51 F.3d at 336.

Unlike Shapiro, where the plaintiff requested an accommodation in the defendant's parking policies, Plaintiff has requested renovation and alteration of her apartment, the Building and surrounding areas. The refusal to make alterations to the Premises is not a refusal of an accommodation in the "rules, policies, practices, or services." Therefore, Plaintiff has failed to state a cause of action upon which relief can be granted and her Amended Complaint should be dismissed.

**B. The Legislative History Of The FHA And The Code Of Federal Regulations Corroborates The Argument Set Forth Above**

The legislative history of the FHA states in pertinent part that:

"[The] modest requirements [including that doors and hallways be wide enough to accommodate wheelchairs, and that most rooms and spaces be on accessible route,] will be incorporated into the design of the new buildings . . . The bill does not require the installation of elevators or 'hospital-like' features, or the renovation of existing units." H.R. Rep 100-711, 1988 U.S.C.C.A.N. 2173, 2179.

The Legislative History further states that Section 3604(f)(3)(B) requires that "changes be made to such traditional rules or practices if necessary to permit a person with handicaps an equal opportunity to use and enjoy a dwelling." Id. at 2186.

The fact that renovations to existing structures are not mandated by the FHA finds further support in the Code of Federal Regulations promulgated pursuant to the FHA, which includes examples of the application of 42 U.S.C. §3604(f)(3)(B). 24 CFR §100.204(a) states that:

"it shall be unlawful for any person to refuse to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a handicapped



person equal opportunity to use and enjoy a dwelling unit, including public and common use areas.”

24 CFR §100.204(b) provides examples to illustrate the application of this section. Example one involves a blind applicant applying to live in a housing community which enforces a no-pets policy. It would be a violation of §100.204 for the landlord of the housing community to refuse to permit the applicant to live in the apartment with a seeing eye dog. 24 CFR §100.203(a) states, in pertinent part, that:

“it shall be unlawful for any person to refuse to permit, at the expense of a handicapped person, reasonable modifications of existing premises, occupied or to be occupied by a handicapped person, if the proposed modifications may be necessary to afford the handicapped person full enjoyment of the premises of a dwelling. . .”

24 CFR §100.203(c) provides illustrations of the application of 24 CFR §100.203(a). One example involves an applicant who has a child who uses a wheelchair. The applicant asks the landlord for permission to widen the doorway to the bathroom at the applicants’ own expense. It would be unlawful for the landlord to refuse to permit the applicant to make a modification as long as the applicant pays for it. *See* 42 U.S.C. §3604(f)(3)(A); 24 CFR §100.203(c). In the case at bar, Plaintiff has not asked Defendants for permission to modify the premises at her expense, but has instead demanded that Defendants modify it themselves at their own expense. As a result, Plaintiff has not been denied a reasonable accommodation pursuant to the FHA and is not eligible for relief. The FHA does not obligate Defendants to renovate Plaintiff’s apartment at the Defendants’ expense.

**C. There Is No Relief Available To Plaintiff Under Any Other Section Of The FHA**

There are two other sections defining discrimination in 42 U.S.C. §3604(f)(3). Even if Plaintiff was permitted to once again amend the Amended Complaint, these two other sections

do not provide a cause of action entitling Plaintiff to relief based on the allegations set forth in the Amended Complaint. Similar to 24 CFR §100.203(a), 42 U.S.C. §3604(f)(3)(A) states, in pertinent part, that discrimination is:

“a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied if such modifications may be necessary to afford such person full enjoyment of the premises.”

This section permits handicapped persons to fund their own modifications of existing premises. Plaintiff has made no allegations that she has offered to pay for renovations, but instead demanded that Defendants make modifications to the premises at their own cost.

The final section of §3604(f)(3), which is §3604(f)(3)(C), applies only “in connection with the design and construction of covered multifamily dwellings for first occupancy after the date that is 30 months after September 13, 1988”. 42 U.S.C. §3604(f)(3)(C). The date referenced in the statute is March 13, 1991. As set forth in the attached Broxmeyer Affidavit, the Building was constructed and available for occupancy well before this date. Attached as Exhibit “G” to the Broxmeyer Affidavit is a copy of the Certificate of Occupancy for the Building demonstrating that the Building was constructed and available for occupancy well before the date provided by the statute.<sup>3</sup> As a result, 42 U.S.C. §3604(f)(3)(C) would not afford Plaintiff relief for any discrimination alleged in the Amended Complaint. Given that Plaintiff has not stated a claim upon which relief can be granted by any of the sections of the FHA, her claims should be dismissed.

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<sup>3</sup> When deciding a 12(b)(6) motion, a court may consider documents attached to the complaint as exhibits or incorporated by reference. Roth v. Jennings, 489 F.3d 499, 509 (2d Cir. 2007); Brass v. Am. Film Techs. Inc., 987 F.2d 142, 150 (2d Cir. 1993). Likewise, a court may consider any documents upon which the complaint relies or which is a public record. Roth, 489 F.3d at 509 (2d Cir. 2007). Moreover, “[i]f a plaintiff’s allegations are contradicted by such a document, those allegations are insufficient to defeat a motion to dismiss.” Matusovsky v. Merrill Lynch, 186 F.Supp.2d 397, 399-400 (S.D.N.Y. 2002) (citation omitted); *See also Rapoport v. Asia Elecs. Holding Co., Inc.*, 88 F.Supp.2d 179, 184 (S.D.N.Y. 2000).



**D. The Americans With Disabilities Act Does Not  
Provide A Remedy For Plaintiff In The Case At Bar**

The Amended Complaint cannot survive a motion to dismiss even if Plaintiff had pled a claim for relief based on the Americans with Disabilities Act (“ADA”) because the ADA only applies to public accommodations and commercial facilities, and not to housing. 42 U.S.C. §12183 states in pertinent part:

“ . . . as applied to public accommodations and commercial facilities, discrimination . . . includes (2) . . . undertaking an alteration that affects or could affect usability of or access to an area of the facility containing the primary function, the entity shall also make the alterations in such a manner that, to the maximum extent feasible the path of travel to the altered area and the bathrooms, telephones and drinking fountains . . . are readily accessible to and usable by individuals with disabilities . . . where such alterations are not disproportionate to the overall alterations in terms of cost and scope.” 42 U.S.C. §12183.

The ADA places a burden upon building owners of public accommodations and commercial facilities that are renovating or altering a building to make the renovations in such a way as to make them accessible to individuals with disabilities. This duty is triggered by the commencement of renovations, and any such language is notably absent from the FHA. This ADA definition of discrimination does not apply to the property in question because it is housing, and is governed by the FHA. As a result, a claim for relief based on the ADA would not breathe life into the Amended Complaint which should be dismissed based on the claims set forth therein.

**POINT II**

**PLAINTIFF’S CLAIM BASED ON RETALIATION SHOULD BE DISMISSED**

In Count Two of the Amended Complaint, Plaintiff alleges that Defendants acted in retaliation against Plaintiff for making complaints regarding Defendants’ refusals to renovate

and alter the Premises and for filing a complaint with the NYS DHR. In order for Plaintiff to maintain an action of retaliation against the Defendants pursuant to the FHA, Plaintiff has the burden to sufficiently plead the elements of 42 U.S.C. §3617, which states, in pertinent part:

“[I]t shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of having exercised or enjoyed, or of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title.” 42 U.S.C. §3617.

In order to successfully plead a claim for relief pursuant to the above statute, Plaintiff must show, inter alia, a causal connection exists between the protected activity and the adverse action.

Regional Economic Community Action Program, Inc. v. City of Middletown, 294 F.3d 35, 54 (2d Cir. 2002) (citations omitted). The Second Circuit has held that a failure to show a causal connection between the alleged protected activity and adverse action is a failure to state a prima facie case of retaliation pursuant to 42 U.S.C. §3617. Lynn v. Village of Pomona, 212 Fed. Appx. 38, 41-42 (2d Cir. 2007).

Plaintiff alleges that commencing the holdover proceeding in the First District Court of the County of Nassau was retaliatory in nature. (Amended Complaint ¶¶ 29, 31). However, as set forth in the Broxmeyer Affidavit, Owner offered a new lease to Plaintiff in July 2007 but Defendant did not sign it. As a result, a proceeding was brought on or about October 9, 2007 to evict Plaintiff as a holdover tenant. On January 30, 2008, Plaintiff and her counsel executed a stipulation of settlement (Exhibit “C” to Broxmeyer Affidavit) in the holdover proceeding by which Plaintiff agreed to a Judgment of Possession in favor of the Owner with a stay of the warrant of eviction through June 30, 2008. This stipulation was signed and executed by Plaintiff and her counsel and completely resolved all factual issues with regard to her status as a holdover

tenant. By virtue of the foregoing, Plaintiff's allegations that Defendants falsely alleged that Plaintiff was a holdover tenant are without any basis.

Moreover, as set forth in the Broxmeyer Affidavit, despite executing the stipulation, Plaintiff brought an Order to Show Cause (*see* Exhibit "E" to the Broxmeyer Affidavit) for an order setting aside the warrant of eviction on the ground that the Owner allegedly entered into a new lease. However, the state court denied Plaintiff's motion (*see* Exhibit "E" to the Broxmeyer Affidavit) and held that there was no intent by Owner to abrogate the stipulation of settlement, and further stayed the warrant of eviction until October 31, 2008.<sup>4</sup>

Given that Plaintiff has signed a stipulation of settlement pursuant to which she admitted and affirmed her status as a holdover tenant at the Building, and the state court reviewed her right to possession of the apartment when she filed the order to show cause and held that she did not have any possessory right to the apartment, she cannot establish a causal connection between her protected activity and the alleged retaliatory eviction proceedings. Plaintiff is clearly seeking to revisit the determination of the state court in her status as a holdover tenant by bringing the retaliation claim. This Court is not the proper forum for Plaintiff to revisit these determinations. Plaintiff's claim for alleged retaliation is improper and should be dismissed.

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<sup>4</sup> Count Nine of the Amended Complaint for unlawful eviction pursuant to NY RPAPL §853 should also be dismissed because Plaintiff was not put out of her apartment by force or by unlawful entry or detainer. Clearly, Plaintiff was evicted pursuant to court order.

**POINT III**

**TO THE EXTENT COUNTS TWO, THREE, SIX, AND EIGHT CHALLENGE  
THE JUDGMENT OF A STATE COURT AUTHORIZING THE EVICTION  
OF PLAINTIFF, THOSE COUNTS ARE BARRED BY THE  
ROOKER-FELDMAN DOCTRINE AND THE DOCTRINES OF  
RES JUDICATA AND COLLATERAL ESTOPPEL**

As set forth above, in Count Two of her Amended Complaint, Plaintiff alleges that Defendants violated the FHA by seeking to evict her in retaliation for their having filed a charge of discrimination with the New York State Division of Human Rights. Pursuant to Count Three of her Amended Complaint, Plaintiff alleges, in part, that Defendants violated 42 U.S.C. §1982 by allegedly seeking to evict her because of their race. In Counts Six and Eight of her Amended Complaint, respectively, Plaintiff alleges that in seeking to evict her, Defendants acted in breach of contract and breach of the implied duty of good faith and fair dealing.<sup>5</sup>

Pursuant to all of these Counts, Plaintiff is attacking a State court judgment authorizing her eviction from the Premises, especially here where she consented while being represented by counsel to give possession of the property at issue to defendant Fairfield and where they have vacated the Premises as alleged at paragraph 18 of the Amended Complaint. Consequently, to the extent those counts are challenging the State court judgment, they are barred by the *Rooker-Feldman* doctrine and the doctrines of *res judicata* and collateral estoppel.<sup>6</sup>

**A. Rooker-Feldman Doctrine**

To the extent this action challenges Plaintiff's eviction from the Building, it should be dismissed under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction under the *Rooker-*

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<sup>5</sup> As a duty of good faith and fair dealing is implicit in all contracts in New York State, Count Six (breach of contract) and Count Eight (breach of implied duty of good faith and fair dealing) are redundant. Fasolino Foods Co., Inc. v. Banca Nazionale Del Lavoro, 961 F.2d 1052, 1056 (2d Cir. 1992); Dalton v. Educational Testing Service, 87 NY2d 384, 389 (1995).

<sup>6</sup> These arguments are only aimed at challenging Plaintiff's claim pertaining to her eviction from 64 Gibson Boulevard and are not aimed at Plaintiff's claim that Defendants allegedly did not make a reasonable accommodation regarding the construction of a ramp.

*Feldman* doctrine. The *Rooker-Feldman* doctrine stands for the general proposition that “federal district courts lack jurisdiction over suits that are, in substance, appeals from state-court judgments.” Hoblock v. Albany County Board of Elections, 422 F.3d 77, 84 (2d Cir. 2005); Sharp v. State of New York, 2007 WL 2480428\*5 (E.D.N.Y. 2007) (Bianco, J.). As the Second Circuit held in *Hoblock*, the *Rooker-Feldman* doctrine applies to “cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.” *Hoblock, supra.*, 422 F.3d at 85; *Sharp, supra.*, at \*5.

The Second Circuit found that there are four requirements for the application of *Rooker-Feldman*: (1) “the federal-court plaintiff must have lost in state court”; (2) “the plaintiff must complain of injuries caused by a state court judgment”; (3) “the plaintiff must invite district court review and rejection of that judgment”; and (4) the state-court judgment must have been rendered before the district court proceedings commenced.” *Id.* All four of the *Rooker-Feldman* requirements are met here.

First, Plaintiff here was the losing party in State court. Owner brought a proceeding in State court to obtain possession of the apartment at issue, and the settlement in that proceeding granted Owner possession of the apartment. Since Plaintiff is now challenging the settlement in that proceeding, this Court should deem Plaintiff to be the loser in that proceeding. Wittich v. Wittich, 2006 WL 3437407\*3 (E.D.N.Y. 2006) (Bianco, J.).<sup>7</sup>

The second *Rooker-Feldman* prong that the plaintiff is complaining of injuries caused by a State court judgment is also met. Plaintiff is basically complaining here of the State court judgment that awarded possession of the premises at issue to Owner. That Plaintiff here is

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<sup>7</sup> Unlike in *Wittich*, the District Court, Nassau County in this case did issue a judgment and a warrant in June, 2008 awarding possession of the premises to Fairfield 64 Gibson LLC. See Broxmeyer Affidavit, Exhibit “D.”

presenting legal theories different from those she presented in State court does not insulate her from the application of the *Rooker-Feldman* doctrine. *Hoblock, supra.*, 422 F.3d at 86-87. Moreover, Plaintiff cannot avoid *Rooker-Feldman* by arguing that she was injured by the actions of Owner in evicting her from their premises. Rather, as Owner only obtained the right to evict Plaintiff through the entry of a State court judgment of possession, it is the State court judgment that caused the injury to Plaintiff and not the actions of Owner. *Hoblock, supra.*, 422 F.3d at 87-88.

The third *Rooker-Feldman* prong, that the plaintiff must invite district court review and rejection of the State court judgment, is also met. In *Babalola v. B.Y. Equities, Inc.*, 63 Fed. Appx. 534 (2d Cir. 2003), the plaintiff there filed a Federal court complaint against her landlord after a State court issued a judgment and warrant evicting the plaintiff in that case. The plaintiff's Federal complaint in *Babalola*, much like that filed by Plaintiff here, alleged that the defendant landlord there violated the FHA and 42 U.S.C. §1982 in seeking to evict her. 63 Fed. Appx. at 535.

The Second Circuit applied the *Rooker-Feldman* doctrine and dismissed the action, holding that "a review of the complaint would necessitate an inquiry into the propriety of the eviction warrant issued by the housing court." 63 Fed. Appx. at 536. *See also, Trang v. Concris Realty Co.*, 2005 WL 1398004 (E.D.N.Y. 2005). Similarly here, Plaintiff's Amended Complaint is inviting this Court to challenge the propriety of the State court judgment awarding Owner possession of the premises and a warrant. Therefore, just as in *Babalola* and *Trang*, this action challenges invites review and rejection of a State court judgment and meets the third *Rooker-Feldman* prong.

The fourth prong of the *Rooker-Feldman* doctrine, that the State court judgment must be rendered before the Federal court proceedings have commenced, has been met based upon a fair reading of Exxon Mobil Corporation v. Saudi Basic Industries Corporation, 544 U.S. 280, (2005). In Exxon Mobil Corporation, the Supreme Court noted that “neither *Rooker* nor *Feldman* supports the notion that properly invoked concurrent jurisdiction vanishes if a state court reaches judgment on the same or related question while the case remains *sub judice* in a federal court.” 544 U.S. at 292. (Emphasis Added) In other words, under *Rooker-Feldman*, the State court judgment must have been rendered before the Federal court proceedings were commenced on the same or related question. *See also*, Posr v. New York State, 2006 WL 656985\*14 (E.D.N.Y. 2006). In this case, the State court judgment in favor of Owner was rendered before the Amended Complaint was filed here on the same or related question.

Plaintiff filed her initial complaint with this Court on January 7, 2008. (*See* Court Docket Document No. 1.) While that complaint alleges numerous grievances with the physical condition of 64 Gibson Boulevard and actions of some employees of Owner, it makes no reference to any eviction proceedings commenced by Owner even though the eviction proceedings were commenced prior to January 7, 2008.

Owner obtained its State court judgment awarding it possession of the premises at issue on June 11, 2008, and was granted a warrant of eviction by the State court on June 12, 2008. The Amended Complaint here challenging the judgment and warrant was filed on November 26, 2008. Consequently, as the Amended Complaint on the issues involved here was filed after the State court judgment it is challenging, under Exxon Mobil Corporation, the fourth *Rooker-Feldman* condition has been met and all claims related to plaintiffs’ eviction should be dismissed under the *Rooker-Feldman* doctrine.



In sum, the Amended Complaint asserts an injury based on the State court judgment awarding possession of the premises to Owner and is essentially seeking a review of that judgment. Consequently, Counts Two, Three, Six, and Eight of the Amended Complaint are barred by the *Rooker-Feldman* doctrine to the extent they challenge plaintiffs' eviction from 64 Gibson Boulevard. Hoblock, *supra*, 422 F.3d at 86-88.

**B. Res Judicata**

The doctrine of *res judicata* prevents parties from re-litigating issues in subsequent litigation that were or could have been litigated in a prior action. Wittich v. Wittich, 2006 WL 3437407\*5 (E.D.N.Y. 2006) (Bianco, J.). New York Courts apply a transactional analysis of *res judicata* "barring a later claim arising out of the same factual grouping as an earlier litigated claim even if the later claim is based on different legal theories or seeks dissimilar or additional relief." Burka v. New York City Transit Authority, 32 F.3d 654, 657 (2d Cir. 1994). *Res judicata* applies when "(1) the previous action involved an adjudication on the merits; (2) the previous action involved the plaintiffs or those in privity with them and (3) the claims asserted in the subsequent action were, or could have been, raised in the prior action." Monahan v. New York City Dep't of Corr., 214 F.3d 275, 284-85 (2d Cir. 2000); Wittich, *supra*, 2006 WL 3437407\*5.

The State court proceeding involved an adjudication on the merits. In the State court action, Plaintiff, represented by counsel, here agreed to give Owner possession of the premises as well as "waive all claims for credits of any nature from petitioner (Owner)," and the agreement to give Owner possession of the premises eventually became a State court judgment. Even though the State court proceeding ended in a judgment stemming from a settlement rather than a decision, the State court judgment still constitutes an "adjudication on the merits" to satisfy this



requirement under the doctrine of *res judicata*. Monahan v. New York City Dep't of Corr., *supra.*, 214 F.3d at 286.

As the State court proceeding involved Plaintiff Ellen Reyes and the plaintiffs in this action are plaintiff Ellen Reyes and her daughter Joy Reyes (someone in privity with Ellen Reyes), the *res judicata* privity requirement has been met. Finally, the claims asserted here were or could have been raised in the prior action. Plaintiff here raised the contract claims (Counts Six and Eight) in the State court and the State court rejected those claims. (See Broxmeyer Affidavit, Exhibit "E".) To the extent that Plaintiffs allege that the eviction was a retaliatory measure in violation of the FHA (Count Two) or was motivated by her race (Count Three), those claims could have been raised in the State court proceeding. See Water's Edge Habitat, Inc. v. Pulipati, 837 F. Supp. 501, 505 (E.D.N.Y. 1993) (defendant in a State court eviction proceeding "is entitled to present all legal and equitable defenses he or she has available under State or federal law," including the FHA defense raised by the defendant in that case), *see also*, Springer v. Lincoln Shore Owners, Inc., 2007 WL 2403165\*3-4 (E.D.N.Y. 2007) (*res judicata* doctrine barred plaintiffs there from raising FHA claims in action challenging judgment of eviction from previous State court proceeding.)

### C. Collateral Estoppel

"Collateral estoppel... means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Schiro v. Farley, 510 U.S. 222, 232 (1994); Galin v. United States, 2008 WL 5378387\*6 (E.D.N.Y. 2008) (Bianco, J.). The principles of collateral estoppel require: "(1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to

litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits.” Ball v. A.O. Smith Corp., 451 F. 3d 66, 69 (2d Cir. 2006); Galin v. United States, *supra*.

The “breach of contract” issues raised by Plaintiff here at Counts Six and Eight of the Amended Complaint were raised, litigated, and decided against Plaintiff by the District Court, Nassau County in an order dated July 29, 2008. The District Court, Nassau County found that the actions of the Owner were not in breach of any contract with the plaintiffs (*see* Exhibit “E” to the Broxmeyer Affidavit). Plaintiff here had a full and fair opportunity to litigate the contract issue in State court, and the resolution of that issue was necessary in order to address Plaintiff’s order to show cause seeking a vacatur of the judgment of possession against them.

Consequently, the doctrine of collateral estoppel bars Plaintiff from asserting her breach of contract claims (Counts Six and Eight) in this action.

#### POINT IV

#### **PLAINTIFF HAS FAILED TO ASSERT ANY FACTS WHICH WOULD GIVE RISE TO AN INFERENCE OF RACIAL DISCRIMINATION**

In Count Three of the Amended Complaint, Plaintiff has alleged that Defendants’ discrimination against Plaintiff was racially motivated. Plaintiff states a claim for relief based upon 42 U.S.C. §1982, which states that:

“All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by the white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”

In order for Plaintiff “to maintain an action under §1982, a plaintiff must allege that she was deprived of a property right because of her race.” Harary v. Allstate Insurance Co., 983 F.Supp. 95, 99 (1997) (*citing see Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 436 (1968));

Bacon v. Suffolk Legislature, 2007 WL 2288044\*10 (E.D.N.Y.). However, “[i]n order to survive a motion to dismiss, the plaintiff must specifically allege the events claimed to constitute intentional discrimination as well as circumstances giving rise to a plausible inference of racially discriminatory intent. . . Therefore a complaint consisting of nothing more than naked assertions, and setting forth no facts upon which a court could find a violation of the Civil Rights Act, fails to state a claim under Rule 12(b)(6).” Harary at 99 (*citing Yusuf v. Vassar College*, 35 F.3d 709, 713-714 (2d Cir. 1994) (*quoting, in turn, Martin v. New York State Dep’t of Mental Hygiene*, 588 F.2d 371, 372 (2d Cir. 1978)); Bacon v. Suffolk Legislature,\*10 (Bianco, J.) (The plaintiff did not articulate intentional racial discrimination with enough specificity to survive a motion to dismiss.).

In the case at bar, Plaintiff has failed to allege any events which give rise to an inference of racial discrimination. Instead, she has merely alleged that she and her daughter are African-American, and that their demands to the Defendants for renovations and new construction of the building were not granted. Throughout the entire Amended Complaint, Plaintiff has set forth that she experienced discrimination due to disability rather than race. Plaintiff’s “naked assertion” of racial discrimination without any facts whatsoever is insufficient to state a claim for relief. Plaintiff has not alleged even one instance of fact which would give rise even to a question of racial discriminatory intent.

Furthermore, as set forth in the Broxmeyer Affidavit, when Plaintiff submitted her complaint to the NYS DHR, she did not include racial discrimination as a ground for relief when she had the opportunity to check off this box on the complaint form (*see* Exhibit “A” to the Broxmeyer Affidavit). By virtue of the foregoing, Plaintiff has not alleged any facts which would support a claim for racial discrimination and her claim for relief should be dismissed.

**POINT V**

**PLAINTIFF HAS FAILED TO STATE A CAUSE OF ACTION  
PURSUANT TO THE NEW YORK HUMAN RIGHTS LAW**

**A. Plaintiff Has Failed To Sufficiently Allege A Refusal To Make An Accommodation**

In Count Four of the Amended Complaint, Plaintiff has alleged that the Defendants' refusal to accommodate her demands to renovate the Premises was discrimination in violation of the New York State Human Rights Law Executive Law §296(18). Assuming, *arguendo*, that this Court decided to exercise jurisdiction over the state law claims,<sup>8</sup> Plaintiff's claim for relief pursuant to the NYS HRL, Executive Law §296(18) should be dismissed nonetheless on the following independent ground. Plaintiff has failed to meet the burden of establishing a prima facie case of failure to provide a reasonable accommodation pursuant to NYS HRL.

Executive Law §296, entitled "Unlawful Discriminatory Practice" states that "it shall be an unlawful discriminatory practice":

"§296(18) to refuse to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford said person with a disability equal opportunity to use and enjoy a dwelling."

The language of the statute mirrors the language of the FHA, 42 U.S.C. §3604(f)(3)(B) set forth above in Point I above. In order to successfully state a claim for relief, Plaintiff must demonstrate, *inter alia*, that the building owner refused to make an accommodation in its rules, policies, practices, or services. This language once again does not provide for relief for a refusal to renovate or alter a facility or premises and has been applied in this way to claims. See Lindsay Park Housing Corp., 866 N.Y.S.2d at 773 (2d Dept. 2008); see also State Division of Human

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<sup>8</sup> The jurisdiction of the federal court to hear the state law claims is based upon supplemental jurisdiction pursuant to 28 U.S.C. §1367. Plaintiff has not sufficiently pled any federal law claims upon which relief may be granted. As such, there is no longer proper jurisdiction for the Court to hear the state law claims brought by Plaintiff and the entire action should be dismissed.

Rights v. Stoute, 36 A.D.3d 257, 264-265 (2d Dept. 2006) (Court used Federal Law to interpret NY Executive Law §296(5)). Based on the aforementioned reasons for dismissal of Plaintiff's claim for relief pursuant to the FHA (discussed at length in Point I), this claim clearly does not sufficiently state a claim upon which relief can be granted and should be dismissed.

**B. Plaintiff has Improperly Alleged That Defendants Have Violated Plaintiff's Civil Rights Based Upon NY Executive Law §291(2)**

In Count Four of the Amended Complaint, Plaintiff has also alleged that Defendants' conduct has violated Plaintiff's civil right to "ownership, use and occupancy of housing accommodation and commercial space without discrimination" based on disability. Plaintiff has cited NY Executive Law §291(2) as the basis for the violation of a civil right, which states, in pertinent part:

"The opportunity to obtain education, the use of places of public accommodation and the ownership, use and occupancy of housing accommodations and commercial space without discrimination because of age, race, creed, color, national origin, sexual orientation, military status, sex or marital status as specified in section two hundred ninety-six of this article, is hereby recognized as and declared to be a civil right." McKinney's Executive Law §291(2).

Plaintiff alleges that Defendants interfered with Plaintiff's civil rights based upon disability. (Amended Complaint ¶ 53). However, this statute does not include disability as a protected class for the basis of a civil rights violation. Plaintiff's claims for relief fail to state a cause of action pursuant to the statute and should be dismissed.

Any attempts by Plaintiff to further amend the Amended Complaint in order to allege a violation pursuant to NY Executive Law §291(2) based on race would be futile. Plaintiff has not alleged any facts in the Amended Complaint which might give rise to the notion that even if,

*arguendo*, the Court finds discrimination, that is was racially motivation as detailed in Point IV above.

## **POINT VI**

### **PLAINTIFF HAS FAILED TO SUCCESSFULLY STATE A CLAIM FOR IIED**

In Count Five of the Amended Complaint, Plaintiff seeks relief for Defendant's alleged IIED. Plaintiff has alleged that Defendants have caused emotional harm to Plaintiff such that Plaintiff was debilitated to the point as to be "forced to file a charge of discrimination with the State Division of Human Rights when the Defendants failed to provide reasonable accommodations." (Amended Complaint ¶ 60). Plaintiff has failed to meet the burden of successfully establishing IIED. Plaintiff's burden to establish this tort consists of four elements. A plaintiff must show (a) conduct which is so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community, (b) [a]n intent to cause or disregard of a substantial probability of causing severe emotional distress, (c) a causation connection between the conduct and the injury, and (d) severe emotional distress. Elmowitz v. Executive Towers at Lido, 571 F.Supp.2d 370, 378-379 (E.D.N.Y. 2008) (internal citations omitted).

#### **A. Plaintiff Has Failed To Allege Any Conduct So Outrageous In Character Or Extreme In Degree As To Go Beyond All Possible Bounds of Decency**

"Very few claims satisfy the extreme and outrageous requirement of an IIED claim." Id. at 378 (*citing Howell v. New York Post Co.*, 81 N.Y.2d 112, 122 (1993)). Instead, Plaintiff has merely alleged conduct which she believes to have been discriminatory, but nothing in the

Amended Complaint alleges extreme conduct on the part of any of the Defendants, which would give rise to the level of being so outrageous that it satisfies Plaintiff's burden.<sup>9</sup>

**B. Plaintiff Has Also Failed To Meet The Burden Of Alleging The Remaining Elements Of A Claim Of IIED**

Plaintiff has failed to state any facts to support the remaining three elements of a claim for IIED. Where a plaintiff has "done nothing more than recite the remaining three elements of a IIED claim . . . [s]uch pleadings are insufficient to state a plausible cause of action for IIED." Elmowitz, 571 F.Supp. at 379. In the case at bar, Plaintiff has merely recited the last three elements of a claim for IIED, and Plaintiff's claim should be dismissed.

Moreover, in New York, a plaintiff can only recover for mental disturbance in the absence of a physical impact if the "mental injury (is) marked by definite physical symptoms that are capable of clear medical proof." Steinhauser v. Hertz Corp., 421 F.2d 1169, 1170 n.1 (2d Cir. 1970) (citations omitted). Plaintiff has instead affirmed that because of the alleged IIED she filed a charge of discrimination with the NYS DHR, and that Plaintiff suffers episodes of anxiety, anger, and mental anguish. (Amended Complaint ¶ 60). Plaintiff has not met her burden of alleging the elements of an IIED claim and her claim for relief should be dismissed.

**POINT VII**

**PLAINTIFF IMPROPERLY NAMED INDIVIDUAL PARTIES AS DEFENDANTS IN THE PRESENT ACTION AND ALL CLAIMS AGAINST THEM SHOULD BE DISMISSED**

Plaintiff has named David Berger, David Ford and David Nobile (collectively, "Individual Defendants") as defendants in this lawsuit. However, even assuming, *arguendo*, that Plaintiff has pled facts sufficient to make a claim pursuant to the FHA, individual liability is still

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<sup>9</sup> Plaintiff has failed to point to any specific acts of conduct of the Individual Defendants in the Amended Complaint which would comprise outrageous or atrocious behavior. As such, Plaintiff is not entitled to any relief from the Individual Defendants and they should be dismissed from this action.



unavailable. The Supreme Court of the United States has held that the traditional rules of vicarious liability apply to claims brought pursuant to the FHA and that “in the absence of special circumstances it is the corporation, not its owner or officer, who is the principal or employer and thus subject to vicarious liability for torts committed by its employees or agents.” Meyer v. Holley, 537 U.S. 280, 286 (2002) (*citing* 3A W. Fletcher, Cyclopedia of the Law of Private Corporations, §1137 pp. 300-301 (rev. ed. 1991-1994)).

Courts have held that only in narrow circumstances, where employees have engaged in affirmative acts of discrimination, or are enforcing a corporation’s discriminatory rules or policies, can they be found individually liable. Andujar v. Hewitt, 2002 WL 1792065\*10 (S.D.N.Y. 2002) (*citing see* Holley v. Crank, 258 F.3d 1127 (9<sup>th</sup> Cir. 2001), cert granted, 535 U.S. 1077 (2002); Hamilton v. Svatik, 779 F.2d 383 (7<sup>th</sup> Cir. 1985); The Open Hous. Ctr. V. Kessler Realty, Inc., No. 96 Civ. 6234, 2001 WL 1776163 (E.D.N.Y. 2001); United States v. Sea Winds of Marco, Inc., 893 F.Supp. 1051 (M.D. Fla 1995) (“The complaint. . . states that Sea Winds instituted a policy requiring identification wristbands to be worn by unit renter. . . It alleges that this policy was enforced by [the individual defendants’] in consultation with the condominium association board, only against Hispanic renters. . . ); Biondo v. Beekman Hill House Apartment Corp., 94 N.Y.2d 659, 662 (2000); United States v. Lorantiffy Care Ctr., 999 F.Supp. 1037, 1045 (N.D. Ohio 1998) (“[T]he government does not allege that each individual himself engaged in a pattern or practice of discrimination. This would, of course be actionable.”)). For example, in Andujar v. Hewitt, the Court discussed whether the plaintiffs stated a claim against each of the individual defendants. The amended complaint contained “extensive allegations about Spink’s conduct toward Andujar directly, and Cordero and Ryan indirectly, which are sufficient to support the claims against her.” Id.



In contrast to the cases noted above, in the case at bar, Plaintiff has failed to allege any affirmative acts of discrimination on the part of any of the Individual Defendants, nor has she alleged that they enforced the corporation's discriminatory rules or practices. She has alleged only that the Individual Defendants were present during a field visit conducted by the NYS DHR. (Amended Complaint ¶25). Due to Plaintiff's failure to allege any affirmative acts of discrimination or enforcement of a discriminatory corporate policy on the part of any of the Individual Defendants, the claims against them should be dismissed.

Furthermore, rather than allege specific facts or incidents of any affirmative discriminatory acts on the part of the Individual Defendants, Plaintiff has merely named the Individual Defendants in their "official capacity." (Amended Complaint ¶¶ 10-12). The meaning of this term is taken to mean that they are parties to this action as mere employees of Defendant, Fairfield Properties. As such, Plaintiff is not able to seek relief from the Individual Defendants pursuant to the principles of vicarious liability. Even if all of Plaintiff's claims are not dismissed, all of her allegations against the individual employees of Defendant Fairfield Properties should be dismissed.

#### **POINT VIII**

#### **PLAINTIFF HAS NAMED THE WRONG CORPORATE DEFENDANT IN THE PRESENT ACTION AND THE CLAIM AGAINST FAIRFIELD PROPERTIES SHOULD BE DISMISSED**

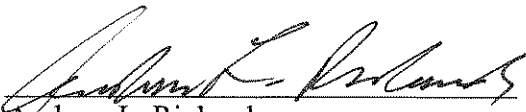
Pursuant to the Broxmeyer Affidavit and Certificate of Occupancy attached to the Broxmeyer Affidavit as Exhibit "G", defendant Fairfield Properties is not the owner of the Building. Rather, Owner is the fee owner of the Building. Since Fairfield Properties is not the fee owner of the Building, the Amended Complaint should be dismissed as against it.

**CONCLUSION**

Wherefore, it is respectfully requested that Defendants' motion to dismiss the Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure be granted in its entirety, along with costs, disbursements, and other and further relief as this Court deems just and proper.

Dated: Woodbury, New York  
February 9, 2009

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